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IN THE

Supreme Court of the United States

October Term, 1967.

No. **890**

SAMUEL GILBERT, *et al.*, stockholders of GLEN ALDEN CORPORATION, suing on behalf of themselves and all other Stockholders of said Corporation, and for the benefit of and in the right of said GLEN ALDEN CORPORATION,

Petitioners,

against

FRANCIS O. CASE, DUDLEY G. LAYMAN, ALBERT A. LIST, ROYAL B. LORD and GLEN ALDEN CORPORATION,

Respondents.

Petition for Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department.

ROBERT L. BOBRICK,
Attorney for Petitioners,
345 Eighth Avenue,
New York, N. Y. 10001
212 CH 2-2282.

THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 RE 2-6978—1967

(8564)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No.

SAMUEL GILBERT, *et al.*, stockholders of Glen Alden Corporation, suing on behalf of themselves and all other Stockholders of said Corporation, and for the benefit of and in the right of said GLEN ALDEN CORPORATION,

Petitioners,

against

FRANCIS O. CASE, DUDLEY G. LAYMAN, ALBERT A. LIST, ROYAL B. LORD and GLEN ALDEN CORPORATION,

Respondents.

---

* The petitioners are: Samuel Gilbert, (Dr.) William W. Kistler, Ruth D. Kistler, Westminster Presbyterian Church Memorial Fund, Garrett E. Walters, John P. McConnell, Jr., Henry Abrams, Stephen R. Abrams, Virginia Abrams, Isaac Fuchs, Peter Macium, Rose Macium, Edward Satkowski, Philip Godfrey, Morris Davidhoff, Frank B. Gass, Lucille Blazer, Hulbert T. E. Beardsley, Harry C. Keller, Joseph F. Storz, Frank Nealis and Mary Nealis, Harry S. Mauser, William A. Pollock, surviving Executor U/L/W of Estelle D. Pollock, Deceased, August B. Coleman, Milton A. Miller, William Bernhardt, Richard H. Perley, Harry G. Davis, Michael G. Spinazzola and Fannie Spinazzola, Howard V. Scotland, Howard V. Scotland, Trustee for Howard V. Scotland, Jr., David Schonberger, Clarence Akershock, Biological Research Institute, Inc., Catherine O'Connor, Arnold F. Good, Jesse E. Shetrom, Mattie H. Clark, Elmer Trethewey, Victor Beaver, Harold Proom, Col G. Atlas and Lillian G. Wrigley.

Petition for Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the two orders of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, entered:

(1) November 21, 1966 (A-1), which denied petitioners' motion (A pp. 2-10) to vacate the order of reversal made by said Appellate Division on June 12, 1961, and the judgment entered pursuant thereto on June 23, 1961, and to direct the entry of an order of affirmance of the judgment of the Supreme Court, Kings County, entered June 16, 1960, and, which was made final by the order entered,

(2) September 19, 1967 (A pp. 25-26), which denied the motion (AB pp. 27-31) of the petitioners for leave to appeal to the Court of Appeals upon certified questions of law.

Opinions Below.

No opinions were rendered by the Appellate Division in making the orders. The dispositions are not reported.

Jurisdiction.

Jurisdiction of this Court is invoked under the Fourteenth Amendment to the Constitution of the United States and 28 U. S. C., §1257(3) [since a title, right, privilege or immunity was specially set up or claimed

under the Constitution of the United States]. The order sought to be reviewed was dated and entered on September 19, 1967, thereby making final the order of November 21, 1966.

Questions Presented.

1. Where the Presiding Justice of an appellate court solicits and receives for a "charitable" organization founded and organized by himself and of which he is President, $19,625 from the chief defendant prior to argument of an appeal and $66,500 thereafter, have petitioners been deprived of "due process of law" and "equal protection of the laws" within the meaning of the 14th Amendment when they lose the appeal by a 3 to 2 vote in which the deciding vote is cast by said Presiding Justice?

2. Is Canon 25 of the Canons of Judicial Ethics of the American Bar Association requiring that "a Judge * * * should not solicit for charities" a mandatory prohibition under the "due process" and "equal protection" clauses of the 14th Amendment?

3. Where petitioners only learned of the solicitation and the payments of money 6 years after the Appellate Division decision, did the Appellate Division and the New York Court of Appeals fail to discharge their Constitutional duties under the 14th Amendment and Section 14 of the Judiciary Law of the State of New York by refusing, *without opinion*, to give petitioners any relief upon disclosure of the facts herein?

4. Did the Court below violate the rule of this Court in *Hansberry v. Lee*, 311 U. S. 32, requiring a "disinterested judge" in all class actions? (p. 45).

Constitutional Provisions, Statute and Canon Involved.

A. United States Constitutional Provisions Involved.

AMENDMENT XIV

"Section 1. * * * nor shall any State deprive any person of * * * property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

B. New York Statutory Provision Involved.

Section 14 of the Judiciary Law of the State of New York, insofar as pertinent herein, provides:

> "Disqualification of judge by reason of interest * * * A judge shall not sit as such in, or take any part in the decision of an action, claim, matter, motion or proceeding, * * * in which he is interested, * * *."

C. Canons of Judicial Ethics.

Canon 25 of the Canons of Judicial Ethics of the American Bar Association states:

> "25. * * * Solicitations for Charity.
>
> "A judge should avoid giving ground for any reasonable suspicion that he is utilizing the power or prestige of his office *to persuade* or coerce *others to* patronize or *contribute, either* to the success of private business ventures, or *to charitable enterprises.* He should therefore not enter into such private business, or pursue such a course of conduct, as would justify such suspicion, nor use the power of his office or the influence of his name to promote the business interests of others; *he should not solicit for charities,* nor should he enter into any business relation which, in the normal course of events rea-

sonably to be expected, might bring his personal interest into conflict with the impartial performance of his official duties."

Statement of the Case.

Petitioners, shareholders of the corporate defendant, Glen Alden Corporation, had sued derivatively to surcharge the other defendants for waste by reason of their conduct in promulgating an illegal reorganization plan.

After a trial, petitioners recovered a judgment for $118,321.08 against the defendants, List, Lord, Layman, Case and Stokes, in the New York Supreme Court, Kings County (*Gilbert v. Burnside,* Misc. 2d , 197 N. Y. S. 2d 623).

The named defendants appealed. The appeals were heard in November, 1960, and were decided on June 12, 1961. The bench consisted of Beldock, Acting P. J.; Christ and Pette, JJ., who voted for reversal, and Ughetta and Kleinfeld, JJ., who dissented and voted to affirm the judgment and order upon the opinion of the learned Justice at Special Term (13 A. D. 2d 982, 216 N. Y. S. 2d 430).

Petitioners appealed, and the Court of Appeals of New York affirmed without opinion (11 N. Y. 2d 960, 229 N. Y. S. 2d 10).

It was later discovered (in April, 1965) that, at the time the appeal was heard in the Appellate Division, "a close personal and business relationship" existed between Mr. Justice Beldock and the principal defendant, List (A-pp. 6, 7, 8).

Petitioners moved the Appellate Division, Second Judicial Department, to vacate its order of reversal entered on June 12, 1961, and the judgment entered pursuant

thereto on June 23, 1961, and to enter an order of affirmance of the judgment of the Supreme Court, Kings County, entered on June 16, 1960 (A-pp. 2-10, 21-24).

Petitioners' Attempt to Have the Appellate Division Decide the Questions of "Due Process" and "Equal Protection."

The nature and object of the motion was as follows: That the order of reversal made by the said Appellate Division, Second Department, was utterly void by reason of the disqualification of Presiding Justice George J. Beldock, and the federal constitutional issues of "due process" and "equal protection" (A-pp. 23-24).

By bare order, the motion was denied (A-p. 1).

Through this motion it was learned for the first time (October, 1966) that respondent Albert A. List, prior to the argument in November, 1960, of the appeal from the judgment recovered against him, had contributed $19,625 to a "charitable" foundation organized and founded by Presiding Justice Beldock, and $66,500 thereafter (A-pp. 19-20).

Petitioners attempted to appeal to the New York Court of Appeals. The appeal was dismissed, upon the ground that the order appealed from does not finally determine the proceedings within the meaning of the (State) Constitution (20 N. Y. 2d 641)* (A-32).

Petitioners then moved in the New York Court of Appeals for leave to appeal to that Court. The motion was

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* In New York, unless the judgment or order is one which finally determines an action or special proceedings, they are not appealable as of right even though a constitutional question is directly involved. *Van Arsdale v. King*, 155 N. Y. 325; *Mozarkel v. Mozarkel*, 224 N. Y. 340.

denied on the ground that the New York Court of Appeals has no jurisdiction to grant leave to appeal from a non-final judgment or order (20 N. Y. 2d 737) (A-32).

Thus, it was established that petitioners' only recourse to an appeal to the New York Court of Appeals was by permission of the Appellate Division.

Thereupon, petitioners moved the Appellate Division for leave to appeal to the Court of Appeals upon certified questions* (A-B-pp. 27-31). By order entered September 19, 1967, with Presiding Justice George J. Beldock taking part and voting, the motion was denied (A-B-pp. 25-26), without opinion. This denial exhausted petitioners' remedies and foreclosed any other and further legal recourse for petitioners in the courts of New York. It made final the order of November 21, 1966 (A-p. 1). It was the final word of a final court. *VanArsdale v. King,* 155 N. Y. 325.

Constitutional questions of "due process" and "equal protection of the laws" were seasonably raised at every stage of the proceedings herein detailed by affidavits and briefs. No answers were furnished by the Appellate Division to the constitutional questions and issues raised by petitioners.

There remains available no review or correction of the orders of the Appellate Division, except by this Court.

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* The motion was pursuant to Article VI, Section 3, subdivision 4, of the Constitution of the State of New York, supplemented by New York Civil Practice Law and Rules 5602 (B) (I).

Reasons for Granting the Writ.

I.

The admitted conduct of Presiding Justice Beldock in accepting prior to argument $19,625 for a so-called "charitable" organization of which he was founder, organizer and President, from respondent and chief defendant Albert A. List violates "the equal protection of the laws" and "due process" clauses of the 14th Amendment, and is squarely within the prohibition of Canon 25 of the Canons of Judicial Ethics of the American Bar Association requiring that "a Judge * * * should not solicit for charities."

Respondents have in effect admitted by their failure *under oath* to assert to the contrary that

1. Petitioners did not learn of the $19,625 payment by respondent Albert A. List to a "charitable" foundation organized and founded by Presiding Justice Beldock, until October 19, 1966, when List so admitted in an affidavit below (A-pp. 19-20), some five years or more since the argument of the appeal in which Justice Beldock cast the deciding 3-2 vote *against* petitioners (A-pp. 7-9).

2. The only remark allegedly made by Justice Beldock at the oral argument was, to quote respondents, "that he was interested in a charitable organization in which one of the defendants, Mr. List, was also interested" (A-pp. 12-18). He did not disclose that his "interest" was that of "organizer and founder" and "recipient" of monies donated by List prior to the oral argument to a "foundation" of which the Judge was president.*

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* To be "interested" in something does not mean that one is president of, and has founded and organized it and solicited funds for it which have been donated to it. The casual manner of stating he was "interested", if he did so state, was thus totally misleading at the time by omission of material facts that under Canon 25 showed his disqualification, and a disqualification that under Section 14, Judiciary Law of the State of New York could not be waived (pp. 10-11, *infra*).

Canon 25 of the *Canons of Judicial Ethics of the American Bar Association,* provides:

Solicitation for Charity.

"A judge should avoid giving ground for any reasonable suspicion that he is utilizing the power or prestige of his office *to persuade* or coerce *others to* patronize or *contribute, either* to the success of private business ventures, or *to charitable enterprises.* He should therefore not enter into such private business, or pursue such a course of conduct, as would justify such suspicion, nor use the power of his office or the influence of his name to promote the business interests of others; *he should not solicit for charities,* nor should he enter into any business relation which, in the normal course of events reasonably to be expected, might bring his personal interest into conflict with the impartial performance of his official duties."

II.

The disqualification of Mr. Justice Beldock rendered the order of reversal of June 12, 1961, of the Appellate Division utterly void and the refusal of that Court to vacate it did not conform with "due process" and "equal protection" of petitioners as minority stockholders in a class action.

Hansberry v. Lee, 311 U. S. 32;
Tumey v. Ohio, 273 U. S. 510.

New York State's Judiciary Law, Section 14, as pertinent here, provides:

"Disqualification of judge by reason of interest.

"• • • A judge shall not sit as such in, or take any part in the decision of an action, claim, matter, motion or proceeding, • • • in which he is interested, • • •."

The word "interest" as used in Judiciary Law, Section 14, clearly includes conduct prohibited by Canon 25 of the Canons of Judicial Ethics. Such conduct is automatic disqualification and not subject to waiver.

It makes a mockery of the Judiciary Law to suggest, as do respondents below, that it sanctions an "interest" of the explicit kind prohibited by the Canons of Judicial Ethics. Such an "interest" as a matter of law makes a Judge "biased" in favor of the donor and is the obvious reason for the prohibition of Canon 25. It has long been settled that a Judge who is "biased" in favor of one party is disqualified under Section 14. *Moers v. Gilbert,* 175 Misc. 733, aff'd 261 App. Div. 957, and other cases therein cited. The disqualification is automatic, may not be waived, is absolute and deprives the Judge or Court of jurisdiction. *Oakley v. Aspinwall,* 3 N. Y. 547; *Low v. Rice,* 8 Johnson 409.

Counsel has the right to assume that a Judge before whom he appears is honest and impartial. Mr. Justice Frankfurter said in *Bridges v. California,* 314 U. S. 252, 382:

> **"The administration of justice by an impartial judiciary has been basic to our conception of freedom ever since Magna Carta. It is the concern not merely of the immediate litigants. Its assurance is everyone's concern, and it is protected by the liberty guaranteed by the Fourteenth Amendment. That is why this Court has outlawed * * * a judicial system which does not provide disinterested judges. *Tumey v. Ohio,* 273 U. S. 510, * * *."**

The 14th Amendment to the Constitution of the United States requires that each party litigant be given "equal protection under the law." To allow one litigant to donate $19,625 prior to oral argument to a "charitable enterprise" (Canon 25) "organized and founded by the Pre-

siding Justice" without automatically disqualifying that Judge—who thereafter casts the deciding 3-2 vote, which takes away from petitioner stockholders their $118,321.08 judgment—is to deprive the opposing litigant of "equal protection."* He has no way of offsetting that "bias" unless to donate an equal or larger sum, a practice that would result in exposing justice to the charge it was on sale by indirect methods of purchase. To uphold the practice here revealed is to deprive the small shareholders both of "equal protection" and of "due process of law"—terms that include a "disinterested judge." *Tumey v. Ohio,* 273 U. S. 510, cited in *Bridges v. California,* 314 U. S. 252, 283.

CONCLUSION.

The petition for a writ of certiorari should be granted. The orders of the Appellate Division, Second Department, dated September 19, 1967, November 21, 1966 and June 12, 1961, should be vacated and the judgment entered on June 23, 1961 vacated, and an order of affirmance directed to be entered of the judgment petitioners recovered in the Supreme Court of the State of New York, County of Kings, and entered on June 16, 1960.

Respectfully submitted,

ROBERT L. BOBRICK,
Attorney for Petitioners.

---

* Except for the vote of the Presiding Justice, Petitioners' judgment below would have been affirmed by a 2-2 vote. The fact that the New York Court of Appeals affirmed the reversal is of no avail to Respondents, since it did not know that the decision of the Presiding Justice had been purchased. *Seward v. Tasker,* 143 N. Y. S. 264 quoted in appendix, page A-23.

APPENDIX A.

Order Appealed From.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on November 21, 1966.

Hon. Henry L. Ughetta,
Acting Presiding Justice.
Hon. Marcus G. Christ,
Hon. Arthur D. Brennan,
Hon. L. Barron Hill,
Hon. Samuel Rabin,
Associate Justices.

[SAME TITLE.]

In the above entitled cause, the above named Francis O. Case, *et al.*, defendants, having appealed to this court from a judgment of the Supreme Court, Kings County, entered in the office of its Clerk on June 16, 1960; this court by dated June 12, 1961 having reversed said judgment; respondents having moved (1) to vacate this court's order dated June 12, 1961 and the judgment entered thereon on June 23, 1961 and (2) to enter an order of affirmance;

Now, upon the papers filed in support of said motion and the papers filed in opposition thereto; and the motion having been duly submitted and due deliberation having been had thereon, it is:

ORDERED that the motion is hereby denied.

Enter:

HERMAN M. POGUL
Clerk of the Appellate Division

Notice of Motion.

To be argued by
Robert L. Bobrick.

Oral argument requested.

NEW YORK SUPREME COURT,

APPELLATE DIVISION—SECOND DEPARTMENT.

[SAME TITLE.]

SIRS:

Please Take Notice that upon the annexed affidavit of Robert L. Bobrick, sworn to on September 2, 1966, the undersigned will move this Court at a Term thereof to be held at the Courthouse of the Appellate Division, Monroe Place, corner of Pierrepont Street, Brooklyn, New York, on September 19, 1966, at 9:30 A.M. or as soon thereafter as counsel can be heard, for an order vacating the order of reversal of this Court entered June 12, 1961, and the judgment entered thereon on June 23, 1961, and entering herein an order of affirmance of the judgment of the Supreme Court, Kings County, entered on June 16, 1960, and for such other and appropriate relief as may be just and proper in the premises.

The basis of the motion is that the order of reversal made by this Court is utterly void due to the disqualification of the then Acting Presiding Justice (now Presiding Justice) George J. Beldock.

Please Take Further Notice that answering papers, if any, are required to be served at least five (5) days before the return date of this motion.

Dated, New York, New York,
September 4, 1966.

Yours, etc.,

ROBERT L. BOBRICK
Attorney for Plaintiffs

To:

O'Brien, Driscoll and Raftery, Esqs.
Attorneys for Defendants-Appellants
Albert A. List, Royal B. Lord and
Dudley G. Layman

Dewey, Ballantine, Bushby, Palmer & Wood, Esqs.
Attorneys for Defendants-Appellants
Francis O. Case and Thomas Stokes

William F. Whitman, Esq.
Attorney for Defendant-Appellant
Glen Alden Corporation

Affidavit of Robert L. Bobrick, Read in Support of Motion.

SUPREME COURT OF THE STATE OF NEW YORK,

APPELLATE DIVISION—SECOND DEPARTMENT.

[SAME TITLE.]

State of New York,
County of New York, ss:

ROBERT L. BOBRICK, being duly sworn, states:

1. I am the attorney for the plaintiffs (respondents). I make this affidavit in support of the motion to vacate the order of reversal made by this court which is dated June 12, 1961, which reversed the judgment of the Supreme Court, Kings County entered in the above action on June 16, 1960 against the defendants, Francis O. Case, Thomas Stokes, Albert A. List, Royal B. Lord and Dudley G. Layman.

Preliminary Statement

2. The ground upon which the motion rests is that the order of reversal is utterly void as the then Acting Presiding Justice George J. Beldock was peremptorily disqualified from sitting in on the appeal and from participating in its decision by reason of his interest in the case. Section 14 of the Judiciary Law disqualifies a judge to sit in or take any part in the decision of an action, claim, matter, motion or proceeding in which he is interested.

Prior Proceedings

3. Plaintiffs, shareholders of the corporate defendant, Glen Alden Corporation, sue derivatively to surcharge the other defendants for waste by reason of their conduct in promulgating an illegal reorganization plan. Actually,

on this motion, the facts of the case and the claims of the parties are not of much importance. Suffice it to say that after a trial, plaintiffs recovered a judgment against the defendants List, Lord, Layman, Case and Stokes (*Gilbert v. Burnside,* Misc. 2d , 197 N. Y. S. 2d 623).

4. The named defendants appealed to this Court. The appeals were heard on November 28, 1960 and were decided on June 12, 1961. The Bench consisted of Beldock, Acting P. J.; Christ and Pette, J. J., who voted for reversal, and Ughetta and Kleinfeld, J. J., who dissented and voted to affirm the judgment and order upon the opinion of the learned Justice at Special Term (13 A. D. 2d 982, 216 N. Y. S. 2d 430).

5. Although the determination of the Appellate Division on this appeal was void because of Mr. Justice Beldock's participation in it when disqualified by law, plaintiffs took an appeal from the three-to-two reversal to the Court of Appeals, which Court affirmed without opinion (11 N. Y. 2d 960, 229 N. Y. S. 2d 10). At the time plaintiffs were not aware of the void determination. This appeal to the Court of Appeals is no answer to the present application.

6. The Court of Appeals was induced to entertain, hear and decide this appeal as a result of a fraud upon that court, in that the facts which disqualified Mr. Justice Beldock from sitting or taking part in the appeal below were not called to the attention of the Court of Appeals either by counsel for the defendants or by Mr. Justice Beldock. The Court of Appeals was justified in relying and did rely on the strong presumption existing in every case before it that a Justice of the Appellate Division would not sit or take part in judgment in a cause in which he was disqualified from sitting or participating, and that, if disqualifying facts existed, the Justice affected thereby would voluntarily and of his own accord withdraw from the case.

7. Indisputably, the principal or key defendant is Albert A. List. He had absolute control of the corporate defendant. He, it was, who determined the operations and financial policies of the corporation with no practical risk of effective reversal of policy decisions; he, Albert A. List, selected the members of the Board of Directors, the technical repository of the decision-making function in the said corporation; he, Albert A. List, was the personification of management in control since the merger of the defendant, Glen Alden Corporation with List Industries, Inc. in 1959; he, Albert A. List, controlled the proxy machinery of the corporation to acquire majorities from the thousands of widely scattered small shareholders of Glen Alden Corporation; he, Albert A. List, controlled the corporate purse-strings; he had the power to appoint himself to any corporate office and directorship, to dispense corporate patronage, to turn over corporate business to individuals or organizations in which he was interested.

The Disqualification of Mr. Justice Beldock

8. At the time the appeal was heard in this court, there existed a close personal and a business relationship between Mr. Justice Beldock and the principal defendant, List. Mr. List had given to and Mr. Justice Beldock had accepted from Mr. List certain gifts for certain organizations in which Justice Beldock had an interest.

9. For instance—there is an organization which calls itself Brotherhood-In-Action. Justice Beldock is the founder. It was incorporated on July 22, 1960 under the Membership Corporation Law. Among its purposes it purportedly fosters equity and equal justice among men of all faiths; it is authorized to receive gifts. Mr.

Justice Beldock was one of the incorporators. At the time of the argument of the appeal Mr. Justice Beldock was president of Brotherhood-In-Action, Inc.

10. Before me is a brochure of Brotherhood-In-Action, Inc., 560 7th Avenue (at 40th Street), New York. On the unnumbered seventh page the officers and committees are stated. Under the heading "Founder and Honorary President" is the name of "Hon. George J. Beldock". Under the heading "Chairman of the Board of Directors" is the name of Albert A. List.

11. The building at 560 7th Avenue, New York, is known as "Brotherhood House" and was designed by the architect, William Lescaze; it is six stories high, includes a 400 seat auditorium, library, conference rooms, a radio-television studio and offices. The cost is reported to be $3,000,000. It was met by contributions from individuals and foundations. Among the individuals and foundations who contributed was the defendant Albert A. List. There is the Albert A. List Foundation, Inc. (of which Albert A. List and members of his family are a majority of the trustees); and there is Alberlist Corporation (most of the stock of which is owned by Albert A. List, members of his family and trusts for their benefit). Gifts given by Mr. List before and after the appeal, directly and indirectly, were substantial.

12. When the information and facts came to my attention, I wrote Mr. Justice Beldock on April 12, 1965. My letter was as follows:

"Hon. George J. Beldock
Presiding Justice
Appellate Division
Second Judicial Department
45 Monroe Place
Brooklyn, New York

Dear Sir:

In 1961 an appeal in the case of *Gilbert and others, stockholders of Glen Alden Corporation, etc. v. Burnside and others, List Industries, Inc. and Glen Alden Corporation* was argued before you as Acting Presiding Justice. The key or principal defendant-appellant was Mr. Albert A. List.

The appeal was from the judgment of the Supreme Court, Kings County, entered June 16, 1960. On or about June 12, 1961, your Court made an order reversing the judgment, with costs, and dismissed the complaint, etc. The Court was divided: Beldock, Acting P. J., Christ and Pette, JJ., concur; Ughetta and Kleinfeld, JJ. dissent and vote to affirm the judgment and order upon the opinion of the learned justice at Special Term (*Gilbert v. Burnside,* Misc. 2d , 197 N. Y. S. 2d 623).

The nub of the majority opinion was that appellants had relied upon advice of counsel, and that was a good defense.

On April 7, 1965, Mrs. Bobrick attended a conference of the New York City Chapter, National Association of Social Workers held at the Brotherhood in Action building. She brought home a brochure of the Brotherhood. In reading it, I noted that you are the Founder and Honorary President, and Mr. Albert A. List is Chairman of the Board of Directors!

I want to know why your obligations and relationships with Mr. List were not disclosed to me, as the attorney for the respondents, at the time the appeal was argued, and why you did not disqualify yourself in hearing and deciding the appeal?

I am writing because I believe that I am entitled to the information.

Respectfully yours,

ROBERT L. BOBRICK"

13. There was no reply. However, on April 19, 1965, at approximately 1:25 P. M., a man, who did not identify himself, telephoned me saying he had a message from Judge Beldock—that though Judge Beldock generally replies to letters he would not do so in this instance—that I can act accordingly.

14. There is no gainsaying that the interest of Justice Beldock in the case before him was as real as life.

The Authorities

15. A memorandum setting forth the statutes and authorities is being submitted in support of this application.

16. Under the law Justice Beldock was peremptorily disqualified in hearing and participating in the case.

17. From early times (and it is true today), it was held that

> "Courts should scrupulously maintain unsullied their dignity and integrity. Every litigant is entitled to nothing less than the cold neutrality of an impartial judge who must possess the disinterestedness of a total stranger to the interests of the parties involved in the litigation, whether that interest is revealed by an inspection of the record or developed by evidence aliunde the record * * * In the administration of justice it is not only requisite that a judge be honest, unbiased, impartial and disinterested in fact, but equally essential that all doubt or suspicion to the contrary should be jealously guarded against and eliminated. Not only is it the duty of a judge to render a righteous judgment but it is of transcendent im-

portance to the litigants and the public generally that there should not be the slightest suspicion as to the fairness and integrity. Caesar demanded that his wife should not only be virtuous but beyond suspicion. The people should not exact less from the judiciary, the most powerful branch of our government."

18. In Deuteronomy the judge is commanded: "* * * thou shall not respect persons, neither take a gift: for a gift doth blind the eyes of the wise, and pervert the words of the righteous" (Ch 16:19).

19. I submit that to allow the order of reversal of this Court to stand is to degrade the judicial process, to undermine the administration of justice and to strike a serious blow to our liberties.

20. Should there be any hesitancy or doubt whether plaintiffs are entitled to the relief they seek, it is requested that a full and open hearing be ordered.

21. All of the foregoing is respectfully submitted.

(Sworn to by Robert L. Bobrick, September 2, 1966.)

Notice of Submission of Affidavits in Opposition.

To be argued by
George A. Raftery

NEW YORK SUPREME COURT,

APPELLATE DIVISION—SECOND DEPARTMENT.

[SAME TITLE.]

SIRS:

Please Take Notice, that the Defendants-Appellants, Francis O. Case, Dudley G. Layman, Albert A. List, Royal B. Lord, and Glen Alden Corporation, submit herewith the attached affidavits of Arthur F. Driscoll, sworn to September 8, 1966, John E. F. Wood, sworn to October 7, 1966, William D. Friedmann, sworn to September 12, 1966, William F. Whitman, sworn to September 19, 1966, and Albert A. List, sworn to October , 1966, in opposition to a Motion made by Robert L. Bobrick, attorney for the plaintiffs, for an Order vacating the Order of Reversal of this Court, entered on June 12, 1961 and the Judgment entered thereon on June 23, 1961.

Yours,

O'BRIEN, DRISCOLL & RAFTERY
Attorneys for Defendants-Appellants
Francis O. Case, Dudley G. Layman,
Albert A. List, Royal B. Lord, and
Glen Alden Corporation

To:

Robert L. Bobrick
Attorney for Plaintiffs

Battle, Fowler, Stokes & Kheel
Attorneys for Defendant-Appellant
Thomas Stokes

Affidavit of Arthur F. Driscoll, Read in Opposition to Motion.

SUPREME COURT OF THE STATE OF NEW YORK,

APPELLATE DIVISION—SECOND DEPARTMENT.

[SAME TITLE.]

State of New York,
County of New York, ss:

ARTHUR F. DRISCOLL, being duly sworn, says: I have been a member of the Bar of the State of New York since 1910.

The firm of O'Brien, Driscoll & Raftery, of which I am senior member, during the period of the pendency of the above-entitled litigation were attorneys for Albert A. List, Royal B. Lord and Dudley G. Layman.

Upon the hearing of the appeal therein held before the Appellate Division, Second Department on the 10th day of November, 1960, I personally argued the said appeal on behalf of the appellants represented by my firm. Upon said hearing I was the first to argue. Justice George J. Beldock was acting presiding justice in the absence of presiding Justice Nolan. As I stood at the lectern, but before I had started my argument, Justice Beldock stated that he wanted to inform all parties that he was interested in a charitable organization and that Mr. List, one of the defendants in the court below and an appellant on the appeal, was also interested in the same organization. He stated very definitely that he wished to make this fact known in order that any party to the litigation might have the opportunity to object to his sitting on the appeal, and he indicated very clearly and my recollection is that he stated in so many words that if any party to the litigation believed that his identification with that organiza-

tion would in any way influence his decision in this matter, he would withdraw from the case.

There was then present in court a number of counsel. Robert L. Bobrick was personally present. Deponent was accompanied by William D. Friedmann, an associate of deponent's in the office of O'Brien, Driscoll & Raftery, and an assistant to the deponent on this particular matter. Mr. John Woods of the firm of Dewey, Ballantine, Bushby, Palmer and Wood, was in court representing Francis O. Case and Thomas Stokes, parties to the litigation. William F. Whitman, as attorney for Glen Alden Corporation, was present in the court. All of these parties affirmatively indicated that they had no objection whatever to Justice Beldock's participation in the decision of this appeal. The appeal was argued in full by the Appellate Division and the judgment of the trial court was reversed by a divided court, as shown in Mr. Bobrick's papers. Thereafter Mr. Bobrick, representing the plaintiffs, took an appeal to the Court of Appeals and that Court unanimously affirmed the decision of the Appellate Division. It was after the decision of the Court of Appeals that I first heard of any contention on the part of Mr. Bobrick that Justice Beldock should have withdrawn from the case.

(Sworn to by Arthur F. Driscoll, Sept. 8, 1966.)

Affidavit of John E. F. Wood, Read in Opposition to Motion.

SUPREME COURT OF THE STATE OF NEW YORK,

APPELLATE DIVISION—SECOND DEPARTMENT.

[SAME TITLE.]

State of New York,
County of New York, ss:

JOHN E. F. WOOD, being duly sworn, deposes and says as follows:

1. I am a member of the firm of Dewey, Ballantine, Bushby, Palmer & Wood and have been a member of the bar of the State of New York since 1935.

2. My firm represented Francis O. Case and Thomas Stokes in the above-entitled litigation and I personally participated in the trial thereof and in the argument of the successive appeals to the Appellate Division, Second Department and to the Court of Appeals.

3. It is my recollection that at the beginning of the argument before the Appellate Division, Second Department on November 10, 1960 Justice Beldock stated that he had had some connection with one or more charitable organizations with which Albert A. List was also connected. It is further my recollection that each of the counsel then present (including counsel for the respondents) stated in effect that this fact should not stand in the way of Justice Beldock's participation in the consideration and decision of the case.

(Sworn to by John E. F. Wood, October 7, 1966.)

Affidavit of William D. Friedmann, Read in Opposition to Motion.

SUPREME COURT OF THE STATE OF NEW YORK,

APPELLATE DIVISION—SECOND DEPARTMENT.

[SAME TITLE.]

State of New York,
County of New York, ss:

WILLIAM D. FRIEDMANN, being duly sworn, deposes and says:

I have been a member of the Bar of the State of New York since 1952.

I have been associated with the firm of O'Brien, Driscoll & Raftery since 1952 and associated with Arthur F. Driscoll, senior member of said firm, during the pendency of the above-entitled litigation as counsel for Albert A. List, Royal B. Lord and Dudley G. Layman.

Upon the hearing of the appeal therein held before the Appellate Division, Second Department, on the 10th day of November, 1960, I was personally present as assistant to Mr. Driscoll, who argued the said appeal on behalf of the appellants represented by our firm.

My recollection as to the events that transpired that day seems quite clear. Mr. Driscoll was the first attorney to argue. Before he commenced his argument, Mr. Justice George J. Beldock, who was acting presiding justice in the absence of presiding Justice Nolan, informed all present that he was interested in a charitable and/or philanthropic organization, and that Mr. List, one of the defendants in the court below and an appellant on the appeal represented by our firm, was also interested in the same organization. Mr. Justice Beldock then

inquired whether any interested party, including counsel involved in the litigation, believed that his identification with that organization would impair his ability to hear the appeal and if there was any such feeling, he would withdraw from the bench hearing the appeal. Further, my recollection seems equally clear that all counsel present, including Robert L. Bobrick, attorney for plaintiffs-respondents, affirmatively indicated that they had no objection whatsoever to Mr. Justice Beldock's participation with respect to the appeal. My specific recollection is that Mr. Bobrick orally addressed the bench and expressed satisfaction and confidence in Mr. Justice Beldock's ability to continue and hear and decide the appeal.

I have read the affidavit of Mr. Driscoll, sworn to the 8th day of September, 1966, and I fully concur with all other matters stated therein which I have not covered herein.

(Sworn to by William D. Friedmann, Sept. 12, 1966.)

Affidavit of William F. Whitman, Read in Opposition to Motion.

SUPREME COURT OF THE STATE OF NEW YORK,

APPELLATE DIVISION—SECOND DEPARTMENT.

[SAME TITLE.]

State of New York,
County of New York, ss:

WILLIAM F. WHITMAN, being duly sworn, deposes and says:

I have been a member of the Bar of the State of New York since December, 1930. I was the attorney for the Glen Alden Corporation, one of the Defendants-Appellants during the pendency of the above-entitled litigation.

Upon the hearing of the appeal therein before the Appellate Division, Second Department, on the 10th day of November, 1960 I was personally present as attorney for the Defendant-Appellant, Glen Alden Corporation. Upon said hearing, Arthur F. Driscoll of the firm of O'Brien, Driscoll & Raftery, attorneys for Defendants-Appellants Albert A. List, Royal B. Lord and Dudley G. Layman, was the first to argue. Before he commenced his argument, Mr. Justice George J. Beldock, who was acting as presiding Justice, informed all present that he was interested in a charitable organization and that Albert A. List, one of the Defendants-Appellants, was interested in the same charitable organization. He stated very definitely that he wished to make this fact known in order that any party to the litigation might have the opportunity to object to him hearing the appeal, and indicated that if any party to the litigation believed that if his identification with that organiza-

tion would in any way influence his decision in the matter, he would withdraw from the case.

There were present in Court the following counsel: Robert L. Bobrick, the Petitioner herein, William D. Friedmann, Esq., associate counsel to Mr. Driscoll, John Wood, Esq., of the firm of Dewey, Ballantine, Bushby, Palmer & Wood, counsel who represented Francis O. Case and Thomas Stokes, Defendants-Appellants and your deponent as attorneys for Glen Alden Corporation.

All of these parties affirmatively indicated that they had no objections whatever to Justice Beldock's participation in the decision of this appeal. The appeal was argued in full before this Court, which reversed the judgment of the trial court. Thereafter, your Petitioner herein, representing plaintiffs-respondents, took an appeal to the Court of Appeals, which unanimously affirmed the decision of this Court.

It was after the decision of the Court of Appeals that I first heard of any contention on the part of the Petitioner that Justice Beldock should have withdrawn from the case.

(Sworn to by William F. Whitman, September 19, 1966.)

Affidavit of Albert A. List, Read in Opposition to Motion.

SUPREME COURT OF THE STATE OF NEW YORK,

APPELLATE DIVISION—SECOND DEPARTMENT.

[SAME TITLE.]

State of New York,
County of New York, ss:

ALBERT A. LIST, being duly sworn, deposes and says:

I was one of the defendants in the above-entitled action and was represented by the firm of O'Brien, Driscoll & Raftery. My defense was conducted by Arthur F. Driscoll, Esq., senior partner of the firm of O'Brien, Driscoll & Raftery.

I have read the affidavit of Robert L. Bobrick in support of a motion to vacate an Order of Reversal of this Court.

There never has existed a close, personal and business relationship between Mr. Justice Beldock and myself. I never at any time attempted to influence the decision of the Honorable Justice George J. Beldock in this case, and any intimation in the affidavit of Robert L. Bobrick that this was done is false and untrue.

I have made the following donations to Brotherhood-in-Action: In the year 1960 I donated $19,125.00 and the Albert A. List Foundation donated $500.00. In the year 1963 the Albert A. List Foundation donated $10,000.00; in 1964, $26,000.00; in 1965, $29,000.00; and in 1966, $1,000.00. From 1960 down to date, I personally, as

indicated, donated $19,125.00 and the Albert A. List Foundation donated $66,500.00 to this charitable organization. During the same period, I contributed far more substantially to other charitable organizations, all of which is a matter of record.

I have served as a Director of Brotherhood-in-Action, Inc. and have been Chairman of the Board of Directors since November 12, 1962.

I believe the defendant had a good and meritorious defense in this action, which is borne out by the decision of the Court of Appeals, when it unanimously affirmed the decision of this Court.

I retired as Chairman of the Board of Glen Alden Corporation on September 20, 1965, and since that date have devoted myself to the management of the many personal investments and real estate interests and to the many philanthropic activities that I am engaged in.

(Sworn to by Albert A. List, October 19, 1966.)

Reply Affidavit of Robert L. Bobrick, Read in Support of Motion.

SUPREME COURT OF THE STATE OF NEW YORK,

APPELLATE DIVISION—SECOND DEPARTMENT.

[SAME TITLE.]

State of New York,
County of New York, ss:

ROBERT L. BOBRICK, being duly sworn, deposes and says:

1. The opposing papers rely on the claim that Mr. Justice Beldock stated at the start of the argument that he and Mr. List were interested in the same charitable organization, and offered to withdraw. The difficulty with that casual statement is that it was not meaningful and was too vague to enable counsel for the plaintiffs-respondents (your deponent) to form a judgment as to Mr. Justice Beldock's interest or his involvement with Mr. List. All of us, it may safely be assumed, are interested in some charitable organizations. For example, that a judge contributes to or is interested in the American Red Cross or Y. M. C. A. or Y. M. H. A. would not disqualify him just because a litigant before him is likewise interested in or contributes to these organizations. What Mr. Justice Beldock did not disclose is that the organization was one he had founded, that he was its president, that it was recently incorporated (July 22, 1960), that gifts were being solicited, that a $3,000,000 building was to be constructed, that he had received for his organization shortly before the appeal was heard $19,625 from Mr. List in marketable stocks or cash or both, that he, Mr. Justice Beldock knew that Mr. List

could be counted on for more contributions (he has since given through his controlled foundation $66,500—see, affidavit of Mr. List).

2. Neither Mr. Justice Beldock nor an officer of the foundation has submitted an affidavit from which we could learn further facts.

3. On the other hand, whether or not Mr. Justice Beldock made a "disclosure," he should have disqualified himself without question or inquiry, as he, himself, knew the fact which peremptorily disqualified him from sitting and participating on the appeal. *This is a disqualification that cannot be waived.*

4. The thrust of the opposition is at the word "interest" in the statute. Any interest, large or small, disqualifies a judge if his complete impartiality is or would tend to be affected, for the prohibition of the statute is absolute and deprives the judge or court of jurisdiction. And where no jurisdiction exists by law it cannot be conferred by consent, it cannot be waived—especially against the prohibitions of a law, which was not designed merely for the protection of a party to a suit, but for the general interests of justice. The receipt of gifts and favors from Mr. List before the argument of the appeal, the known expectation of further gifts and favors constituted in any sense a real, tangible, visible interest. Mr. Justice Beldock's disqualification is unassailable.

As was said by the Court of Appeals (p. 551):

> "The provisions of our revised statutes on this subject profess to be merely declaratory of universal principles of law, which makes no distinction between the case of interest and that of relationship, both operating equally to disqualify a judge."
> (*Oakley v. Aspinwall*, 3 N. Y. 547)

5. The lack or failure of jurisdiction has no time limit and may be raised at any time. (*M. of Caffrey,* 52 App. Div. 268; *Davis v. Seaward,* 85 Misc. 210). A claim of laches is out of place.

6. The defendants argue that plaintiffs cannot claim that they were prejudiced by the presence of Mr. Justice Beldock as a member of the Appellate Division which heard and decided the appeal because of the affirmance by the Court of Appeals.

As we said by the Court in another instance:

> "The Court of Appeals was induced to entertain, hear and decide this appeal by a species of fraud upon that Court in that the facts which disqualified Mr. Justice Burr from sitting below were not called to the attention of the Court of Appeals either by Mr. Wilson in his brief or by Mr. Justice Burr in his opinion. The Court of Appeals was justified in relying and did rely on the strong presumption existing in every case coming before it that a justice of the Appellate Division would not sit in judgment in a cause in which he was disqualified from sitting and that, if disqualifying facts existed, the justice affected thereby would voluntarily and of his own accord withdraw from the case."
> (*Seaward v. Tasker,* 143 N. Y. S. 264, 267.)

7. Plaintiffs raise here the constitutional question whether a trial, decision or a determination of a judge who is disqualified from participation in the consideration and decision of the case, and who is thereby not impartial or of doubtful partiality, deprives a litigant of property and rights without due process of law under the Fourteenth Amendment of the United States Constitution which prohibits any State to deprive any person of life, liberty, or property, without due process of law, or to

deny to any person within its jurisdiction the equal protection of the laws (Sec. 1). The right to an impartial determination by a Court is guaranteed by the Constitution. As a Court said: "Every litigant is entitled to nothing less than the cold neutrality of an impartial judge, who must possess the disinterestedness of a total stranger to the interests of the parties involved in the litigation." (*People v. Kohl,* 17 Misc. 2d 320, 1959).

8. It is evident that the whole truth is not before the Court on this application. The situation calls for a full and complete hearing of Mr. Justice Beldock's participation, directly or indirectly, in the affairs of Brotherhood-In-Action, including the planning and construction of the $3,000,000 building and all subsequent expenditures of said organization. This matter has branches, and the branches twigs.

Conclusion.

9(a) The motion should be granted vacating the order of reversal of June 12, 1961, the judgment entered thereon on June 23, 1961, and reinstating the judgment of the Court below. At this time a full hearing should be ordered to take evidence.

(Sworn to by Robert L. Bobrick, November 10, 1966.)

APPENDIX B.

Order on Motion to Appeal to the Court of Appeals.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on September 19, 1967.

Hon. George J. Beldock,
Presiding Justice.
Hon. Marcus G. Christ,
Hon. Arthur D. Breman,
Hon. Samuel Rabin,
Associate Justices.

SAMUEL GILBERT, *et al.*,

Respondents,

v.

FRANK BURNSIDE, *et al.*,

Defendants,

and

FRANCIS O. CASE, *et al.*,

Appellants.

In the above entitled cause, the above named Samuel Gilbert, *et al.*, respondents, having moved for leave to appeal to the Court of Appeals;

Now, upon the papers filed in support of said motion and the papers filed in opposition thereto; upon the papers on which the appeal was determined; and the motion having been duly submitted and due deliberation having been had thereon, it is:

ORDERED that the motion is hereby denied.

Enter:

HERMAN M. POGUL
Clerk of the Appellate Division

Notice for Leave to Appeal.

SUPREME COURT OF THE STATE OF NEW YORK,

APPELLATE DIVISION—SECOND DEPARTMENT.

[SAME TITLE.]

SIRS:

Please Take Notice, that upon the annexed affidavit of Robert L. Bobrick, sworn to the 19th day of July, 1967, the order of this court entered the 21st day of November, 1966, the papers upon which said order was based, the order of this court entered June 12, 1961, the record on appeal to this court and the briefs filed therein and upon all the papers and proceedings had herein, the undersigned will move this court at a Term thereof to be held at the courthouse of the Appellate Division, Monroe Place, corner Pierrepont Street, Brooklyn, New York, on the 6th day of September, 1967, at the opening of Court that day, or as soon thereafter as counsel can be heard for an order granting plaintiffs leave to appeal pursuant to CPLR §5602 (b)(1) to the Court of Appeals upon certified questions stated in the annexed affidavit from the order entered in the office of the Clerk of the Appellate Division, Second Judicial Department on the 21st day of November, 1966, which order denied the motion of the plaintiffs (1) to vacate the order dated June 12, 1961 of said Appellate Division (*inter alia* reversing a judgment in their favor—see 13 A. D. 2d 982, affirmed 11 N. Y. 2d 960) and the judg-

ment entered thereon on June 23, 1961 and (2) to enter an order of affirmance, and for such other and appropriate relief as may be just and proper in the premises.

Dated: New York, N. Y., July 19, 1967.

Yours, etc.,

ROBERT L. BOBRICK
Attorney for Plaintiffs
Office and P. O. Address:
345 Eighth Avenue
New York, N. Y. 10001
Tel. (212) 242-2282

To:

O'Brien, Driscoll and Raftery, Esqs.
152 West 42nd Street
New York, N. Y. 10036
Attorneys for Francis O. Case, Dudley G. Layman, Albert A. List, Royal B. Lord and Glen Alden Corporation, Defendants

Affidavit of Robert L. Bobrick.

SUPREME COURT OF THE STATE OF NEW YORK,

APPELLATE DIVISION—SECOND DEPARTMENT.

[SAME TITLE.]

State of New York,
County of New York, ss:

ROBERT L. BOBRICK, being duly sworn, deposes and says as follows:

1. I am the attorney for the plaintiffs, who were respondents in this Court.

2. Defendants, Francis O. Case, *et al.*, appealed to this Court from a judgment of the Supreme Court, Kings County, entered in the office of its Clerk on June 16, 1960. This Court by order dated June 12, 1961 reversed said judgment. Plaintiffs moved to vacate the order of reversal, and for other relief. The basis for the motion was that the order of reversal was and is utterly void by reason of the disqualification of Mr. Justice George J. Beldock, then Acting Presiding Justice, now the Presiding Justice. The Court by its order entered on November 21, 1966, denied the motion to nullify its order of reversal.

3. Plaintiffs appealed on constitutional grounds from the order entered November 21, 1966, to the Court of Appeals. This was done on the supposition that in a proceeding originating in the Appellate Division there can be no reversal or modification, and an appeal would lie as of right in such a situation on the basis of a constitutional question. (See: *Valz v. Sheepshead Bay Bungalow Corp.*, 249 N. Y. 122; *DeVeau v. Braisted*, 5 N. Y. 2d 236, aff'd 363 U. S. 144.)

4. Argument was heard by the Court of Appeals on April 17, 1967. On May 23, 1967, the Court of Appeals dismissed the appeal, without opinion, upon the ground that the order appealed from does not finally determine the proceedings within the meaning of the Constitution. (All concurred, except Fuld, Ch. J., and Keating, J., taking no part.)

5. Plaintiffs then moved in the Court of Appeals for leave to appeal. Their motion was dismissed on July 7, 1967 upon the ground that the order sought to be appealed from is not final within the meaning of the Constitution.

6. The only recourse open to plaintiffs now is to obtain leave to appeal to the Court of Appeals from this Court.

7. Accordingly, plaintiffs move pursuant to Article VI, Section 3, subdivision (4) of the Constitution of the State of New York, supplemented by CPLR 5602(B)(1) for leave to appeal to the Court of Appeals upon certified questions, from the order of this Court entered November 21, 1966, inasmuch as the appeal involves questions of law which ought to be reviewed by the Court of Appeals.

8. It is submitted that the following questions of law ought to be certified to the Court of Appeals for answer in conformity with CPLR §5713:

Question One: Is the admitted conduct of Presiding Justice Beldock with respect to defendant, Albert A. List, within the prohibition of Canon 25 of the Canons of Judicial Ethics of the American Bar Association requiring that "a Judge * * * should not solicit for charities"?

Question Two: Does the word "interest" as used in the Judiciary Law, Section 14, include the conduct prohibited by Canon 25 of the Canons of Judicial Ethics?

Question Three: Did the admitted conduct of Presiding Justice Beldock automatically disqualify him?

Question Four: Was Mr. Justice Beldock's disqualification so absolute that it could not be waived?

Question Five: Was the order of reversal of the Appellate Division of June 12, 1961 entered in violation of "equal protection" and of "due process of law" under the Fourteenth Amendment to the Constitution of the United States as well as the Constitution of the State of New York?

Question Six: Is the order of the Appellate Division, Second Judicial Department of June 12, 1961 null and void?

WHEREFORE, plaintiffs pray for leave to appeal to the Court of Appeals upon certified questions of law, as herein specified.

ROBERT L. BOBRICK

Sworn to before me this
19th day of July, 1967.
WILLIAM F. JACKEL,
Notary Public, State of New York.
No. 30-7050750.
Qualified in Nassau County.
Commission Expires March 30, 1968.

Decision of New York Court of Appeals.

GILBERT, ap. v. BURNSIDE, def. (Case, res)—Appeal dismissed without costs, upon the ground that the order appealed from does not finally determine the proceeding within the meaning of the Constitution (*Matter of Gladstone,* 19 N. Y. 2d 603).

No opinion. All concur, except Fuld, Ch. J., and Keating, J., taking no part.

Decision of the Court of Appeals on Motion for Leave to Appeal to the Court of Appeals.

MOTION for leave to appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered November 21, 1966, which denied a motion by plaintiffs (1) to vacate an order of said court, entered June 12, 1961, (a) reversing, on the law and the facts, so much of a judgment of the Supreme Court, entered in Kings County upon a decision of the court on a trial at Special Term (A. DAVID BENJAMIN, J.), as directed that plaintiffs recover a specified sum from individual defendants-respondents and (b) dismissing the complaint, (2) to vacate the judgment, entered June 23, 1961 upon said order of June 12, 1961 (see 13 A. D. 2d 982, affd. 11 N. Y. 2d 960), and (3) to enter an order affirming said judgment of Special Term.

Motion dismissed upon the ground that the order sought to be appealed from is not final within the meaning of the Constitution.

SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
JAN 13 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 890

SAMUEL GILBERT, et al., stockholders of Glen Alden Corporation, suing on behalf of themselves and all other Stockholders of said Corporation, and for the benefit of and in the right of said GLEN ALDEN CORPORATION,

Petitioners,

against

FRANCIS O. CASE, DUDLEY G. LAYMAN, ALBERT A. LIST, ROYAL B. LORD and GLEN ALDEN CORPORATION,

Respondents.

BRIEF BY THE RESPONDENTS IN OPPOSITION

GEORGE A. RAFTERY,
EDMUND C. GRAINGER, JR.,
Attorneys for Respondents,
152 West 42nd Street,
New York, New York 10036.
WI 7-5128

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 890

SAMUEL GILBERT, et al., stockholders of Glen Alden Corporation, suing on behalf of themselves and all other Stockholders of said Corporation, and for the benefit of and in the right of said GLEN ALDEN CORPORATION,

Petitioners,

against

FRANCIS O. CASE, DUDLEY G. LAYMAN, ALBERT A. LIST, ROYAL B. LORD and GLEN ALDEN CORPORATION,

Respondents.

BRIEF BY THE RESPONDENTS IN OPPOSITION

Opinions Below

No opinions were rendered by the Appellate Division in making the Orders appealed from. The opinion of the New York Court of Appeals dismissing petitioner's appeal to that Court from the decision of the Appellate Division appears at page 32 of Appendix to the Petition* and is reported at 20 N. Y. 2d 747. The decision of the New York

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* Herein "Pet. App."

Court of Appeals denying plaintiff's motion for leave to appeal to that Court from the Orders of the Appellate Division as to which certorari is sought appears at page 32 Pet. App. and is reported at 20 N. Y. 2d 637.

Jurisdiction

The first Order of the Appellate Division (intermediate Appellate Court) of the Supreme Court of the State of New York as to which petitioner seeks a writ of certiorari (Pet. App. 1) was entered November 21, 1966, and the second order of that same Court was entered September 19, 1967 (Pet. App. 25-26). The petition for a writ of certiorari was filed December 6, 1967. The jurisdiction of this Court is invoked under 28 U.S.C., § 1257 (3).

Questions Presented

Whether the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department was correct in denying a motion five years after the event by petitioners (a) to vacate the June 12, 1961 Order of the Appellate Division reversing the judgment of the Supreme Court of Kings County upon the decision of that Court after trial awarding plaintiffs a specified sum from the individual respondents and dismissing the complaint; and (b) to vacate the judgment entered June 30, 1961 upon the said June 12, 1961 Order. (See 13 A. D. 2d 982, aff'd 11 N. Y. 2d 960).

Whether the New York Court of Appeals was correct in (1) dismissing the appeal from the denial by the Appellate Division of the motion to vacate on the ground that the Order appealed from was non-final; (See 20 N. Y. 2d 741; Pet. App. 32); (2) thereafter denying leave to appeal to the Court of Appeals from the Order of the Appellate Division. (See 20 N. Y. 2d 637; Pet. App. 32.)

Whether the Appellate Division was correct in denying (Pet. App. 25-26) leave to appeal to the Court of Appeals on certified questions.

Rule Involved

Revised Rules of the Supreme Court of the United States.

Rule 19. Considerations governing review on certiorari.

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

Statement

Petitioners, shareholders of the corporate respondent, Glen Alden Corporation, had in April, 1958 sued derivatively to surcharge the other respondents. After trial, petitioners recovered on December 31, 1959 a judgment against the respondents (197 N.Y.S. 2d 623).

Respondents appealed to the Appellate Division, Second Department. The appeal was heard on June 12, 1961. The bench consisted of Judge Beldock, Acting P.J. and Justices Christ, Pette, Ughetta and Kleinfeld. The judgment of the lower Court was reversed by a 3-2 vote, Justices Beldock, Christ and Pette voting for reversal and Justices Ughetta and Kleinfeld voting to affirm (13 A. D. 2d 982).

Prior to the commencement of argument, Justice Beldock informed all counsel present that he was interested in a charitable and philanthropic organization and that Mr. List, one of the defendants, was also interested in the same organization. He stated very definitely that he wished to make this fact known in order that any party to the litigation might have the opportunity to object to his hearing the appeal, and indicated that if any party to the litigation believed that this would in any way influence his decision he would withdraw from the case. All counsel present, including the attorney for the petitioner, affirmatively indicated that they had no objection to Mr. Justice Beldock's participation (Pet. App. 12, 13, 14, 15, 16, 17 and 18).

Petitioners appealed to the Court of Appeals, the highest court in New York, which unanimously affirmed the decision of the Appellate Division (11 N. Y. 2d 960).

Approximately five years later, on or about September 4, 1966, the petitioner moved in the Appellate Division to vacate the order of reversal entered June 12, 1961 and the judgment entered thereon on the asserted ground that "the order of reversal made by (said) Court is utterly void, due

to the disqualification of the then Acting Presiding Justice (now Presiding Justice) George J. Beldock (Pet. App. 2-3)". In the affidavit of the attorney for the petitioners upon which the motion was based (Pet. App. 4-10) it is suggested that the New York Court of Appeals had been induced to entertain and decide the appeal from the reversal in June of 1961 by the Appellate Division of the judgment in favor of the petitioners by the Trial Court as a result of a fraud purporting, according to the attorney, to flow from the refusal of Mr. Justice Beldock to disqualify himself from hearing in the Appellate Division in 1961 the appeal from the Trial Court's judgment in favor of the petitioners. The grounds asserted for compulsory disqualification are that at the time the appeal was heard in the Appellate Division there existed a close business and personal relationship between Presiding Justice Beldock and one of the respondents, Albert A. List. Examination of the attorney's affidavit discloses that this relationship is asserted to have existed through a charitable organization known as "Brotherhood-in-Action" of which Presiding Justice Beldock was one of the founders, and Honorary President, and of which respondent List is asserted to be Chairman of the Board of Directors.

In opposition to petitioners' motion in the Appellate Division there were submitted affidavits of Arthur F. Driscoll, a member of the bar of the State of New York for over fifty years, and then senior member of the firm of O'Brien, Driscoll & Raftery, John F. Wood, a member of the firm of Dewey, Ballantine, Bushby, Palmer & Wood, and of two other attorneys who were present on November 10, 1960 when the appeal from the judgment of the Trial Court was argued (Pet. App. A12, 13, 14, 15, 16, 17 and 18). These affidavits demonstrate that at the outset of the argument in the Appellate Division on November 10, 1960 Justice Beldock had stated that he had a connection with one or more charitable organizations with which the

respondent List was connected, and that when Justice Beldock made that statement each of the counsel present at the time of the argument, including counsel for the petitioners herein, stated that this fact would not stand in the way of Justice Beldock participating in the consideration and decision of the case as far as each of them was concerned.

The Appellate Division of the Second Department considered the motion by the petitioner all five justices (excluding Justice Beldock) unanimously denied the motion Pet. App. 1).

Petitioner thereupon sought to appeal from that denial to the New York Court of Appeals. That Court dismissed the appeal unanimously (except that Chief Justice Fuld and Justice Keating took no part) on the ground that the Order appealed from did not finally determine the proceeding within the meaning of the Constitution (20 N. Y. 2d 741; Pet. App. 32).

Petitioner then moved the Court of Appeals for leave to appeal to that Court. This motion was denied (20 N. Y. 2d 637; Pet. App. 32).

Petitioner then moved (Pet. App. 27-31) in the Appellate Division for leave to appeal to the New York Court of Appeals upon certified questions. This motion was on September 19, 1967 unanimously denied (Pet. App. 25-26).

Argument

1. Assuming, *arguendo*, that the motion by petitioner in the Appellate Division would constitute a "case" or "controversy" within the purview of Article III of the Constitution of the United States, it is clear that the request for a writ should be denied for all of the following reasons, any one of which is normally independently sufficient for denial: (a) there is no final judgment or decree, (b) the

decision which petitioner seeks to review is not that of the highest court of the State of New York, (c) no substantial Federal question is presented, (d) that question, if presented, was not properly raised and preserved in the courts of the State of New York, and (e) in any event, the decisions of the New York Appellate Division and Court of Appeals rests upon state grounds which independently and adequately support the results reached.

2. This Court has uniformly announced that its power to issue a writ of certiorari will only be used when the Court is satisfied that in the circumstances it is of a character appropriate for the exercise of the important discretion which the Court has in the area. This discretion, the Court has repeatedly said, is intended primarily to be used in the broad interests of jurisprudence and uniformity of decision and to give the Supreme Court such supervision as would avert diversity of judgments and guard against inadvertence of conclusions in controversies involving weighty and serious measures (*In re Woods,* 143 U. S. 202; *Forsyth* v. *Hammond,* 166 U. S. 506, 513-515). This Court has held that its power under certiorari jurisdiction should be exercised sparingly and with great caution, and only in cases of peculiar gravity and general importance, particularly where it is important to secure uniformity of decision (*Hamilton-Brown Shoe Co.* v. *Worth Bros. and Co.,* 240 U. S. 251; *Magnum Import Co.* v. *Coty,* 262 U. S. 159).

It is submitted that under the facts of the instant case there is no necessity for invoking the extraordinary jurisdiction of the Supreme Court under the certiorari statute, since there are no questions of public importance presented (*Layne & Bowler Corporation* v. *Western Weld Works,* 261 U. S. 387).

The gravaman of the petitioner's argument here is that as a matter of fact there were circumstances present which required a reversal of a judgment entered five years prior

to the beginning of the instant proceeding. This constitutes an essential attempt to have this Court review evidence and discuss specific factual contentions, a procedure which the Court has in the past declined to adopt (*United States* v. *Johnston,* 268 U. S. 220; *Houston Oil Co. of Texas* v. *Goodrich,* 245 U. S. 440).

Petitioner seeks essentially to re-litigate a matter of private concern between himself (indeed, between his counsel) and respondent List, a practice which the Court has viewed with disfavor in the past (*Forsyth* v. *Hammond, supra*) or, at the very least to give him in this Court the hearing the New York State courts below have thrice denied him, a practice which this Court has found equally inappropriate (*Magnum Import Co.* v. *Coty, supra;* see also: *New York Cent. & H.R.R. Co.* v. *Kinney,* 260 U. S. 340).

In summary, the application to this Court is a startingly appropriate one for the application of the doctrine that certiorari, being a highly selective process, should be exercised in the interests of the law, not in the interest of particular parties. No suggestion is made by petitioner that there is a need for the writ to be issued in order to secure harmony of decisions or to settle questions of general importance in the administration of Federal justice (Robertson and Kirkham's *Jurisdiction of the Supreme Court of the United States,* 1951 ed., p. 591).

Indeed, no more fitting case for the application of the principles stated by the Court itself in its Rule 19, *supra,* can be conceived.

3. Examination of petitioner's initial motion in the Appellate Division of the New York Supreme Court (App. 2-10) compels the conclusion that no Federal question was properly presented, or if presented, preserved, in the Courts of the State of New York, and indeed, if any were presented, they were insubstantial at most. This Court from the time of its foundation has adhered to the principle

that it will not review judgments of State Courts that rest on adequate and independent State grounds (*Herb* v. *Louisville & Nashville Railroad Company*, 224 U. S. 117, 125). It is essential to the jurisdiction of this Court in reviewing the decision of the Court of the State that it appear affirmatively from the record not only that a Federal question was presented for decision in the highest court of the State having jurisdiction, but that its decision of the Federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it (*Lynch* v. *New York ex rel. Pierson*, 293 U. S. 52, 54).

There is not in this record any holding by the highest Court of the State of New York that a Federal statute or treaty is repugnant to the Federal Constitution; nor has the highest Court of the State of New York sustained the validity of a State statute against the claim that it is repugnant to the Federal Constitution, treaties or law; nor is the converse of any of the foregoing propositions presented.

This is not a case in which there is an asserted conflict between a decision of the highest Court of the State of New York and any Federal Court of Appeals, or of any other State.

This is not a case involving a construction or application of Federal statutes or treaties.

At best, petitioner here asserts he was denied due process of law because a Justice who had disclosed the possibility of a remote connection with only one of many litigants sat on, and participated in the determination of a matter five years previous.

He now seeks to invoke in support of his contention Section 14 of the Judiciary Law of the State of New York. Petitioner does not claim that Mr. Justice Beldock had any interest in the subject matter of the above action or in the

outcome of the trial directly or indirectly. Section 14 of the Judiciary Law provides that a judge is not disqualified unless he has an interest in the subject matter of the litigation. This interest must be to the extent that the judge would personally gain or lose according to the outcome of the litigation (*Matter of Ryers, et al.*, 72 N. Y. 1, 15; *Matter of Carter*, 193 App. Div. 356; *Long* v. *Stites*,, 63 F. 2d 855, 858. *Carmody-Waite,* NEW YORK PRACTICE, Vol. 1, p. 244; CORPUS JURIS SECUNDUM, Vol. 48, p. 1046). Brotherhood-In-Action, through which the allegedly disqualifying relationship existed, was not a party to the above action and had no interest in the outcome nor does the petitioner claim that Mr. Justice Beldock had any interest in the subject matter of the above action or in the outcome of the trial directly or indirectly.

Ten of the Appellate Justices of the courts of the State of New York have listened to and unanimously refused to give credence to petitioner's current assertions.

Respondents concede that the proper administration of justice requires an impartial judiciary. In a proper case it is quite possible that the facts might warrant review by this Court where the impartiality of the justices who considered the matter below is brought into question. This Court's real concern with constitutional due process might in a proper case be considered to require review in such circumstances because it was a substantial Federal question essential to the administration of equal justice. Here, however, at best the charge is that because one of at least sixteen respected Justices of the State of New York might, by reason of a remote association with one of four individual defendants, have had, despite his offer to disqualify himself, greater reason for disqualification than those he announced to the counsel before hearing the argument of the appeal, a judgment entered in 1961 should be vacated. Such a proposition is hardly one which is of a gravity sufficient to require the attention of this Court.

CONCLUSION

Petitioner's application should be denied.

Respectfully submitted,

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